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ABSTRACT

The "least restrictive means" test, a frequently used tool for resolving First Amendment cases in federal courts, is designed to insure that state-imposed abridgement of free expression is limited to the narrowest scope and the least impact necessary to fulfill a compelling state interest. Analysis of the history of the test since its inception in 1876 shows long periods of disuse and several recent instances of inconsistent use and of misue of the courts. A detailed examination of the arguments of Supreme Court Justice Felix Frankfurter in the case of Shelton v. Tucker (1960) reveals that those arguments contained the seeds of two major challenges to the least restrictive means test: (1) that the judiciary should defer to legislative rationality; and (2) that statutes should be judged solely in terms of their effects rather than being called unconstitutional per se. A third challenge stemmed from the Court's identification of a classification system for forums of communication, which determined that the test should be applied only to communication articulated in quasi-public or "quintessentially" public forums. While standards like the least restrictive means test can theoretically insure constitutional rights, vigilant analysis and criticism of the uses of such tests is necessary to the survival of such rights. (One hundred fifty-two footnotes are included.) (MHC)

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# Least Restrictive Means

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by

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LEAST RESTRICTIVE MEANS

The Supreme Court has employed several tests to determine the constitutionality of statutes and directives that infringe upon First Amendment rights. Which of these, however, has been resorted to most frequently in the last decade? Although a precise answer to this question awaits a comprehensive survey of Court's opinions, a strong case can be made for the claim that the "least restrictive means" test is among the standards most frequently employed by the Court. It has been employed in cases involving both prior restraints and post hoc determinations of guilt. The test has been applied in a variety of subject areas, from zoning ordinances to obscenity, commercial speech, free press/fair trial and political expression. It has been invoked in both civilian and military environments.

Yet "least restrictive means" is seldom discussed in the literature. Only two law review articles have focused exclusively on the instances of application of the test; the most recent was written two decades ago. Other essays treat the test's appearance in selected cases, without systematic analysis of its application.

Francis Wormouth and Harris Mirkin analyzed what they called "The Doctrine of the Reasonable Alternative" in 1964. [1] The authors erred in citing the origins of the doctrine; they also failed to adequately distinguish between "reasonable alternatives" and the overbreadth standard. [2] They concluded that the test preserves "conflicting values and maintains the integrity of the constitutional order"; yet they castigated the Supreme Court for refusing to employ the test in national-security cases arising during the McCarthy era. [3] The **Yale Law Journal** published an essay on the "Less Drastic Means" test five years later. Although the student author concluded that reliance upon the test as a useful tool for resolving First Amendment disputes was an "illusion", [4] twenty years later the Federal courts continue to invoke it.

A survey of three law-review essays addressing the role of the test in determining the constitutionality of National Security Decision Directive 84 reveals little agreement on the origins of the "least restrictive means" test or the authoritative precedents that justify its use. [5] Of the twelve Supreme Court decisions cited by these authors as invoking the test, only one case was cited in all three essays, and only five of the twelve cases were cited more than once. [6] The authors generally understood the test in the context of prior restraints upon government employees' speech, but did not agree on its origins or the most important instances of its application.

Even the literature pertaining to the general topic of freedom of speech fails to adequately address the "least restrictive means" test. Melville Nimmer, for example, recognizes the language employed in the test but conflates it with the doctrine of overbreadth. [7] Thomas Tedford identifies the test, but asserts that it is employed less frequently than general tests of due process (vagueness and overbreadth), degree-of-danger tests (bad tendency, clear and present danger, incitement), and balancing tests (general and ad hoc). Tedford identifies similarities but not differences between the "least restrictive means" test and the overbreadth doctrine [8]. Elsewhere he suggests that a judicial determination of overbreadth would render a restriction invalid and preclude invocation of the "least restrictive means" test, [9] which is not only incorrect but inconsistent with his assertion of identity between the standards. [10] Nonetheless, Tedford's treatment of the test is clearly the most comprehensive of the major analyses. Jerome Barron and Thomas Dienes identify the test in the "Introduction" to their **Handbook**, but refer to it only once, and that reference is implcit. [11] Joseph Hemmer and Franklyn Haiman never mention the "least restrictive means" test. [12]

The dearth of treatment in the available literature concerning one of the most frequently-used tests in First Amendment cases and the seriousness of the misconceptions regarding its use are both puzzling and distressing. Why has such an important test been overlooked in the literature, and has this inattention influenced the invocation or evolution of the test? These are difficult questions, and the conclusion of this essay hazards only speculative answers. Rather, this analysis focuses on the origins and primary examples of application of the "least restrictive means" test, its incorporation into broader standards for assessing the constitutionality of restraints upon free expression, and some recent instances of its use, abuse and omission in judicial decision-making.

## NATURE OF THE "LEAST RESTRICTIVE MEANS" TEST

The "least restrictive means" test is designed to insure that, when freedom of expression is abridged in the interest of the state, the effect of the abridgment is limited to the narrowest scope necessary to fulfill that interest. Analysis begins, then, with the identification of a compelling state interest, and proceeds to specify the means to satisfaction that are (a) most narrowly drawn, and (b) least intrusive upon the (First Amendment) rights of individuals.

The "least restrictive means" test is grounded in the same fundamental premise as the doctrine of overbreadth: that restrictions upon expression emanating from the invocation of a legitimate state interest should abridge the rights of none but those whose speech arguably compromises that interest. In other words, both overbreadth and "least restrictive means" are intended to protect the innocent, who might otherwise be "chilled" and refuse to communicate or who, alternatively, might express their views and become subject to punishment. However, three differences between these juridical standards merit mention.

First, the "least restrictive means" test is concerned not only with restricting the **scope** of regulations but also with minimizing their **impact.** In this sense a court might authorize a restriction on the **content** of certain messages in order to insure that other communications without the offending content remain free from governmental interference. [13] Thus the "least restrictive means" test surpasses the doctrine of overbreadth in one important way--in attempting to reduce the degree of adverse impact of governmental contraints upon First Amendment rights. Second, the test requires that the available means of restriction be surveyed to determine which imposes the least constraints upon the constitutional right of free expression. [14] In other words, the test compels jurists to (at least superficially) compare alternative means to determine which of these is actually least restrictive of First Amendment rights. This comparison of means presupposes an explicit identification of all the available means and a detailed assessment of the scope and impact of each, an operation beyond the scope of the overbreadth doctrine. Third, the overbreadth doctrine "permits the invalidation of regulations on First Amendment grounds even when the litigant challenging the regulation has engaged in no constitutionally protected activity." [15] Generally speaking, the advocate who argues for a less restrictive means that nonetheless would apply to her/his conduct could not escape the imposition of sanctions thereby.

One terminological observation is essential: a wide variety of labels have been affixed to the invocation of the test. What the Supreme Court initially referred to as "less drastic means" [16] has also been referred to as "less onerous alternatives" [17], "least drastic means" [18], "least restrictive alternative" [19], "less restrictive alternatives" [20] and "the doctrine of the reasonable alternative" [121]. This essay employs the designation "least restrictive means" for three reasons. First, it is neutral, since none of the authorities cited herein use this language. [22] Second, the term "least" indicates that the Court in applying the test will sanction abridgment of First Amendment rights only when that abridgment is the **narrowest** restriction requisite to securing a valid state interest. This is important because, as this essay will demonstrate, the test has been invoked to **uphold** regulations on free expression. [23] Third, the term "means" is more precise than "alternatives": "means" are clearly separable from "ends", while the distinction between "ends" and "alternatives" is less clear. This is important because the "least restrictive means" test can be (and has been) invoked to establish that worthy ends do not justify questionable means. [24]

## DEVELOPMENT OF THE "LEAST RESTRICTIVE MEANS" TEST

The Supreme Court initially articulated the originating principle informing the "least restrictive means" test in 1876, in Chy Lung v. Freeman. [25] The State of California delegated to the Commissioner of Immigration the authority to "satisfy himself whether or not any passenger who shall arrive in the State by vessels from any port or place (who is not a citizen of the United states) is lunatic, idiotic, deaf,

dumb, blind, crippled or infirm, and is not accompanied by relatives who are able and willing to support him, or is likely to become a public charge, or has been a pauper in any other country, or is from sickness or disease . . . a public charge, or likely soon to become so, or is a convicted criminal, or a lewd or debauched woman." [26] Any person so classified was denied permission to land, unless the owner or master of the vessel posted a bond sufficient to insure that the immigrant would not become a ward of the state. [27] Chy Lung, categorized as a "lewd and debauched woman" by Commissioner Freeman, incapable of posting the required bond via her shipmaster, and imprisoned until she could be returned to China, tested the constitutionality of the statute.

Justice Miller, writing for a unanimous Court, not[illegible]the scope of the statute, the discretionary power vested in the Commissioner, and the potential for abuse inherent in both. Nevertheless the Court was obligated to take into account the articulated intent of the law, which was to indemnify the State of California and its county and local governments from the financial burden of immigrants who would likely become wards of the state. Justice Miller found the weakness of the statute in its overbreadth: "The State of California goes so far beyond what is necessary or even appropriate for this purpose, as to be wholly without any sound definition of the right under which it is supposed to be justified. Its manifest purpose . . . is not to obtain indemnity, but money." [28] The majority opinion then elaborated upon the evils of the statute's broad scope by citing unreasonable hypothetical examples of its application. This is the earliest record of the Supreme Court's invocation of the overbreadth doctrine, and consequently the foundation for the "least restrictive means" test. [29]

In Hannibal and St. Joseph R. R. Co. v. Husen, the Court invoked the "least restrictive means" test two years later to determine the constitutionality of a Missouri statute regulating interstate comerce. [30] In an attempt to control hoof-and-mouth disease, the State of Missouri banned the importation of cattle from Texas, Mexico or Indian lands between March 1 and November 1 of any given year. Justice Strong, writing for a unanimous Court, displayed a sensitivity to the manifest concern of the State to exercise its police power to control the importation of diseased cattle. Thus he united the overbreadth analysis in **Chy Lung** with the power of Congress to control interstate commerce. The right of a State to protect itself "could only arise from vital necessity, and . . . could not be carried beyond that necessity." Taken together, Congress' jurisdiction over interstate commerce and the requirement that State authority be strictly limited "deny validity to any state legislation professing to be an exercise of police power for protection against evils from abroad, which is beyond the necessity for its exercise whenever it interferes with the rights and powers of the federal Government." [31] Justice Strong proceeded to measure the Missouri statute against the rule of law:

> Tried by this rule, the Statute of Missouri is a plain intrusion upon the exclusive domain of Congress. It is not a quarantine law. It is not an inspection law. It . . . [limits the importation of cattle] no matter whether they are free of disease or not. . . . Such a statute . . . is beyond the power of a State to enact. [32]

With regard to the counterclaim that inquiries regarding the appropriateness of alternative means are the exclusive province of the State legislatures, Justice Strong responded:

> With this we cannot concur. The police power of a state cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise; and under color of it, objects not within its scope cannot be secured at the expense of the protection offered by the Federal Constitution. And as its range sometimes comes very near to the field committed by the Constitution to Congress, it is the duty of the courts to guard vigilantly against any needless intrusion. [33]

The Supreme Court's ruling in the **Husen** case is important for several reasons. First, it lays down the rule that, when state and federal authority conflict, the state's exercise of its police power must be limited to the narrowest means necessary for its exercise. This is a clear subscription to the "least restrictive means" test. [34] Second, the majority ruling justifies this restriction of state power by citing the evils of overbreadth and by identifying alternative means (quarantine and inspection) that might well satisfy the test. [35] Though these are only hints at less restrictive measures, they indicate the direction of the Court's thinking. Third, Justice Strong's majority opinion specifies that the "least restrictive means" test is designed to assess the **constitutionality** of statutes. Fourth, the opinion dismisses the objection that state legislative prerogative supercedes judicial authority in such matters. Thus the Court anticipated and answered one of the major objections to invocation of the "least restrictive means" test. [36]

Despite its vision and forcefulness, the **Husen** ruling scarcely left footprints in the sands of juridical time. Only by identifying a series of opinions, each referring to one preceding case and innocent of doctrinal evolution, can the student of law trace the connection between the **Husen** ruling in 1876 and Near v. Minnesota in 1931, [37] the first case that applied the test to restraints upon freedom of expression.

In 1888 the Court encountered its first opportunity to employ the test in a case involving the commerce clause. Pennsylvania outlawed the manufacture of oleomargarine within the State. The Court declined to review the regulatory alternatives in search of a less restrictive means, asserting that these were matters "of fact and public policy which belong to the legislative department [of the State] to determine." [38] In subsequent cases the Court has consistently held that prohibition rather

than regulation is a valid means for controlling actually or potentially harmful articles. [39] Only a regulation of commerce that "has no real or substantial relation to" the object of the State, "but is a clear, unmistakable infringement of rights secured by the fundamental law", can be challenged on constitutional grounds. [40] This "reasonable relationship" test has become common in commerce cases [41], and has even been employed to permit the regulation of concededly harmless articles [42]; but it does not totally foreclose resort to the "least restrictive means" test to determine the constitutionality of commercial regulations. [43]

The Supreme Court's transition from implicit to explicit identification of less restrictive means was gradual. In 1917 the Court assessed the constitutionality of a regulation, adopted by the people of the state of Washington via initiative and referendum, abolishing private employment agencies. In Adams v. Tanner, Justice McReynolds wrote for the majority that total prohibition was improper because abuses could be prevented by regulation. [44] Eight years later, in Pierce v. Society of Sisters, the Supreme Court invalidated an Oregon law requiring all children to attend public schools. [45] This law had the effect of outlawing private education in the State. Justice McReynolds, again writing for the Court and relying upon his prior opinion in **Adams**, held that "the power of the state reasonably to regulate all schools" sufficed to insure quality education; the method proposed was simply too extreme. [46] Here the identification of a means less intrusive upon the constitutional rights of the people provided ground for rejection of a more oppressive regulation, but in both cases the alternative methods were couched in general terms.

Explicit reliance upon, if not specification of, the "least restrictive means" test in First Amendment cases made a dramatic entrance in the **ratio decidendi** in the landmark case of Near v. Minnesota. [47] J. M. Near, publisher of **The Saturday Press**, a notorious scandal sheet, ran afoul of the Minnesota Gag Law. This law, "an experiment in control of the press that had aroused the concern of the newspaper world," permitted the state to "enjoin perpetually the persons" publishing any "malicious, scandalous and defamatory" periodical or newspaper. [48] Near's attacks upon public officials for their involvement with "Jewish Gangsters" precipitated invocation of the Gag Law, and its constitutionality was upheld in the lower courts. [49] By a 5-to-4 decision the Supreme Court overruled, Chief Justice Hughes specifically citing the existence of a less restrictive means to control vituperative publications: "Public officers, whose character and conduct remain open to debate and free discussion in the press, find their remedies for false accusations in actions under libel laws providing for redress and punishment, and not in proceedings to restrain the publication of newspapers and periodicals . . . ." [50] And again: "The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct. Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege." [51]

The dissenters argued that libel suits were an inexpedient remedy because of recurring insolvency among publishers. If, as the Chief Justice admitted in his argument for the majority, lewd publications could be restrained, why not defamatory ones? [52] The answer seems to reside in the direction of these scandal sheets: they criticized public figures, and such criticism is to be assured maximum protection. Hence the majority opinion abounds with historical references to the function of freedom of expression in a democracy. [53] It was precisely because the Minnesota gag Law was so effective a vehicle for public officials to wield against their detractors that a less restrictive means was constitutionally required. [54]

This sensitivity to prior restraint appears again in Lovell v. Griffin (1938), wherein Chief Justice Hughes delivered a unanimous opinion condemning the actions of the City of Griffin, Georgia, in attempting to absolutely regulate the distribution of literature on its streets. [55] After hinting at a variety of limitations that might have allowed the regulation to pass constitutional muster, Chief Justice Hughes indicted the embrace of the law: "The ordinance prohibits the distribution of literature of any kind at any time, at any place, and in any manner without a permit from the City Manager." Hughes concluded that the requirement "strikes at the very foundation of the freedom of the press by subjecting it to license and censorship." [56] The next year, in Schneider v. State (1939), the Court simultaneously struck down four ordinances--of the cities of Los Angeles; Milwaukee; Worchester, Massachusetts; and Irvington, New Jersey--designed to limit the distribution of handbills in order to protect against littering. [57] The Court was more explicit in dealing with the overbreadth of these statutes: "There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets." [58] Tedford calls this "an implied argument based on the doctrine of less drastic means" [59], but it seems explicit enough. Subsequent to the **Schneider** decision, the Court invalidated four more restrictions over the next two decades by implicitly invoking the "least restrictive means" test. [60]

A specific articulation of the standard finally appeared in 1960, in Shelton v. Tucker. [61] Teachers in Arkansas public schools and colleges were required, as a condition of employment, "to file annually an affadavit listing without limitation every organization to which he [sic] has belonged or regularly contributed to within the preceding five years." [62] The Supreme Court ruled 5-4 that the requirement was unconstitutional insofar as it applied to teachers who were hired on a year-to-year basis, but nonetheless held that the statute itself was unconstitutional because its scope was "completely unlimited." [63] The law required disclosure of religious, political and social affiliations of no demonstrable interest or value to the State. The majority opinion began its extensive discussion of precedent with the first explicit statement of the "least restrictive means" test:

> In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose. [64]

Justice Felix Frankfurter wrote an extensive dissent, to which three of his brethren subscribed, [65] addressing (inter alia) the scope of the Court's jurisdiction to inquire into alternative means of securing an important State interest. "Where state assertions of authority are attacked as impermissibly restrictive upon thought, expression, or association," Frankfurter opined, "the existence vel non of other possible means of achieving the object which the State seeks is, of course, a constitutionally relevant consideration." [66] But Frankfurter immediately withdrew with the right hand what he offered in the left: "The issue remains whether, in light of the particular kind of restriction upon individual liberty which a regulation entails, it is reasonable for a legislature to choose that form of regulation rather than others less restrictive." [67] The dissenting Justice proceeded to present an altogether unconvincing account of the need for Arkansas to know about all of the associations of each teacher: "[O]rganizational connections," he asserted, "may become inescapably demanding and distracting. Surely a school board is entitled to inquire whether any of its teachers has placed himself [sic], or is placing himself [sic], in a condition where his [sic] work may suffer." [68] Then Justice Frankfurter completely outdid himself by turning this intrusion into an argument **for** academic freedom, "because that very freedom in its most creative reaches, is dependent in no small part upon the careful and discriminating selection of teachers"! [69] To his credit, Frankfurter recognized that the information thus collected could be "used to further a scheme of terminating the employment of teachers solely because of their membership in unpopular organizations," but remained confident that there would be "time enough, if such use is made, to hold the application of the statute unconstitutional." [70] This imaginative analysis did not lead Frankfurter to recognize, however, that if a teacher's "organizational connections" became "inescapably demanding and distracting," there would be "time enough" to dismiss the teacher for dereliction of duty. Nor did he realize that the argument provided the State of Arkansas carte blanche to dismiss teachers who belonged to **any** organization whatsoever on grounds of distraction and excessive time demand--or, more likely, to select the organizations most disfavored and to dismiss teachers who belonged to them, on the asserted ground that only these organizations were too intrusive upon the mission of the educational system to be tolerated.

Nonetheless, Frankfurter's argument is important because it contains the seeds of two major challenges to the appropriateness of the "least restrictive means" test. First, Frankfurter constructed an argument calling for deference to legislative rationality, an appeal that echoes in challenges to the test even today. Second, Frankfurter urged postponement of consideration of the constitutionality of the statute

until such time as it would be employed in a manner patently violative of the rights of individuals. In other words, he urged that the statute be measured solely in terms of its effects, rather than deemed unconstitutional per se. This attempt to deflect criticism from the nature of the restriction by focusing upon its interpretation via political actors spawned two very different approaches to employment of the "least restrictive means" test. Those who have followed (albeit inadvertently) the design of the **Shelton** majority have urged that overly-restrictive statutes are unconstitutional per se, except when no less restrictive alternatives can be identified. In contrast, those who write in the spirit of Justice Frankfurter propose that even those regulations which appear to be overly restrictive in breadth or impact should not be declared unconstitutional unless they have actually been abusively employed in application. The difference between the two schools of thought may be depicted in another way: the first, or "facially-invalid", school is demonstrably concerned with the presence of "chilling effects"; the second, or "invalid-in-effect", school attends only to instances of direct denials of constitutional rights.

## CONTEMPORARY APPLICATIONS OF THE TEST

Aesthetically, it would be advantageous to follow the genealogy of cases from **Shelton** to the present, in order to identify contemporary applications of the "least restrictive means" test. Unfortunately, such an approach might be as misleading as it would be revealing, for current cases rely as much upon alternative standards for authority as upon "least restrictive means" lineage. Therefore, the reader is whisked to the environment of present-day cases that invoke the test.

The "least restrictive means" test is currently invoked when regulations are alleged to be overbroad or discriminatory. The test, however, is employed to justify two dramatically different outcomes: to **invalidate** comparatively more restrictive--and therefore unconstitutional--restraints, and to **uphold** regulations that constitute the least restrictive alternative. In both kinds of cases we ask, "Is the regulation at issue the least restrictive means of advancing a state interest?" We ask this question apart from our assessment of the importance of the interest and from the determination of the "reasonableness" of the relationship between the regulation and the interest.

### Finding the "Less Restrictive Means" for Abridging Political Expression

In a 1988 case, Boos v. Barry, the Supreme Court invalidated a regulation prohibiting the unfettered exercise of expression proximate to embassies within the District of Columbia. [71] At issue was the constitutionality of one portion of § 22-1115 of the District of Columbia Code, which reads in pertinent part:

> It shall be unlawful to display any flag, banner, placard, or device designed or adapted to intimidate, coerce, or bring into public odium an foreign government, party, or organization, or any officer or officers thereof, or to bring into public disrepute political, social, or economic acts, views, or purposes of any foreign government, party or organization . . . within 500 feet of any building or premises within the District of Columbia used or occupied by any foreign government or its representative or representatives as an embassy, legation, consulate, or for other official purposes . . . . [72]

In an opinion written by Justice O'Connor, the Supreme Court ruled 5-3 that, because § 22-1115 was "a **content-based** restriction on **political speech** in a **public forum**," the regulation must be "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end." [73] In support of this interpretation, the Court cited four cases purportedly supporting this test for assessing the constitutionality of

restraints upon political expression. [74] The Court had no problem determining that the regulation served a "powerful" national interest--the interest in protecting the dignity of foreign diplomatic personnel--but noted that any regulation must accord with the Constitution and the Bill of Rights. [75] Thus the Court concluded that "[e]ven if we assume that international law recognizes a dignity interest and that it should be considered sufficiently 'compelling' to support a content-based restriction of speech, we conclude that §22-1115 is not narrowly tailored to serve that interest." [76]

To justify this conclusion the Court compared the language of the statute in question to that of an analogous federal statute, Title 18 U.S.C. §112(b)(2), designed to implement the nation's international obligations to protect the dignity interest of foreign embassies outside the District of Columbia. The Court found that only activity undertaken to "intimidate, coerce, threaten, or harass" foreign officials was prohibited outside of the District, and that Congress had specifically recommended the repeal of §22-1115 and the concomitant amendment of §112 to include the District. The ground for this action, the Court noted, was the need to protect the rights of free speech and assembly. The Court additionally observed that the District of Columbia had indeed repealed §22-1115, contingent upon Congressional action to extend the protection of §112 to the District of Columbia. [77] Only the lack of Congressional response had prevented the Court from designating the issue as moot. Hence the Court concluded that "the claim that the display clause is narrowly tailored is gravely weakened," and that "the availability of alternatives such as §112 amply demonstrates that the display clause is not crafted with sufficient precision to withstand First Amendment scrutiny" because "it is not narrowly tailored; a less restrictive alternative is readily available." [78] This is a clear and direct application of the "least restrictive means" test to resolve a contemporary free-speech controversy.

Invocation of the "least restrictive means" test in **Boos** was grounded in five cases, each of which merits at least minimal scrutiny. The test was introduced in language requiring that the regulation of expression be "narrowly drawn"--very inexact language that could as easily justify employment of simple overbreadth or vagueness analysis. [79] One case--Perry Education Assn. v. Perry Local Educators Assn.--was cited on point and three additional cases--Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc., Cornelius v. NAACP Legal Defense and Educational Fund, Inc., and United States v. Grace--were identified in accord with invocation of the requirement that statutes be narrowly drawn. [80] A fifth case--Wygant v. Jackson Bd. of Ed.--was invoked when the test was applied to the circumstances of the case. [81]

**Perry** considered the constitutionality of a clause in a collective-bargaining agreement between a school district and its teachers' union, Perry Education Association. The clause specified that the recognized union, but no other union, would have access to the interschool mail system within the district. A rival union asserted that the agreement constituted a denial of access violative of the First and Fourteenth Amendments. The Court disagreed. The majority opinion by

Justice White articulated three somewhat different tests for assessing the constitutionality of regulations controlling the content of expression communicated in various forums. The mail system was ultimately classified as a nonpublic forum, and the School District was therefore under no obligation to allow the rival union access to the system.

The analysis of alternative means of regulation was established in the Court's identification of a classification system for forums of communication. In "quintessential public forums," such as streets and parks long reserved for communicative purposes, the state may enforce content-based exclusions of speech only if it can "show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." [82] The Court cited a single case, Carey v. Brown, in support of this conclusion. [83] The Court additionally noted that quintessential public forums could also be controlled via "time, place and manner" regulations "which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." The Court cited five cases as authoritative in disposing of "time, place and manner" challenges. [84] In **Perry**, the "least restrictive means" test was **not** specifically identified as the appropriate standard for assessing the constitutionality of either content-based or content-neutral (time, place and manner) regulations. Nor was the test cited as appropriate to determine the validity of restrictions upon speech in "limited public forums"; the Court stated only that "[r]easonable time, place and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest." [85] Finally, the Court held that "nonpublic forums", those not traditionally or specifically designated for public communication, are subject to both "time, place and manner" regulations and to reasonable, non-viewpoint-related controls. [86] The tripartite classification system articulated in **Perry** has been adopted as a standard reference-point in recent cases involving freedom of expression. [87]

**Perry** is relevant to the current inquiry despite the fact that it was not a "least restrictive means" case, the suggestion by the Court in **Boos** notwithstanding. Paradoxically, the dissenting opinion in **Perry** employed the test in an attempt to demonstrate that the regulation is unconstitutional. [88] In the **Boos** Court's reliance on **Perry**, therefore, we find the initial evidence for a recurring phenomenon: the "least restrictive means" test is often confused with similar, related standards for determining the constitutionality of regulations of speech. Furthermore, the test is invoked both by those who seek to declare regulations unconstitutional and by those who seek to uphold them.

A second case cited in **Boos** justifying invocation of the "least restrictive means" test is Board of Airport Comm'rs. of Los Angeles v. Jews for Jesus, Inc. [89] There the majority found a regulation "banning all 'First Amendment activities' at Los Angeles International Airport (LAX)" violative of the First Amendment. [90] Justice O'Connor's majority opinion, however, only incidentally referred to the **Perry**

categories of public forums and classified the regulation as "facially unconstitutional under the First Amendment overbreadth doctrine **regardless of the proper standard**" [91]--hardly a ringing endorsement of the "least restrictive means" test. How this decision is in accord with **Boos** is left to the imagination of the reader.

A third case diagnosed as "in accord with" the majority opinion in **Boos** is Cornelius v. NAACP Legal Defense and Educational Fund, Inc. [92] Here Justice O'Connor again delivered an opinion focused not upon the "least restrictive means" test but upon the **Perry** classification system. [93] At issue was the exclusion of certain legal defense and political advocacy organizations from the Combined Federal Campaign (CFC), a charity drive aimed at federal employees. The majority ruled that, since the CFC was a nonpublic forum, access restrictions need only be reasonable and viewpoint-neutral. In dissent, Justice Blackmun (joined by Justice Brennan) argued **inter alia** that the regulation in question was not narrowly-tailored to achieve a compelling government interest. [94] Once again, no relevance of the test to the facts of the case is established, nor is the utility of the test examined.

The fourth casse cited as authority for employing the "least restrictive means" test in **Boos** is United States v. Grace. [95] Mary Grace and others challenged the validity of Title 40 U.S.C. §13k, which prohibited the display of "any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement" in the United States Supreme Court building or on its grounds. [96] In his majority opinion, Justice White tacitly employed the "least restrictive means" test in order to find the regulation unconstitutional. He began by citing "public forum" analysis, and noted that "time, place and manner" regulations are enforceable in such forums only when the restrictions "'are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.'" [97] The quotation, of course, is verbatim from **Perry**; White cites three additional cases as examples. [98] White added, however, that "[a]dditional restrictions such as an absolute prohibition on a particular type of expression will be upheld only if narrowly drawn to accomplish a compelling governmental interest," and cited **Perry** and Widmar v. Vincent. [99] After determining that the public sidewalks surrounding Supreme Court Building constitute a "public forum", Justice White admitted that purposes of the Act--to protect the grounds and maintain proper order and decorum--were legitimate. On the other hand, the majority questioned "whether a total ban on carrying a flag, banner or device on the public sidewalks substantially serves these purposes." In the process, Justice White implicitly employed the "least restrictive means" test:

> There is no suggestion, for example, that appellees' activities in any way obstructed the sidewalks or access to the building, threatened injury to any person or property, or in any way interfered with the orderly administration of the building or other parts of the grounds. * * * A total ban on that conduct is no more necessary for the maintenance of peace and tranquility on the public sidewalks surrounding the building than on any other sidewalks in the city. [100]

The first sentence of this quotation suggests some kinds of conduct that might merit restraint, which is a shorthand way of inferring that a regulation stringently focused upon these activities might satisfy the "least restrictive means" test. The second sentence, however, clearly identifies the regulation at issue as far too restrictive to survive scrutiny. The regulation is obviously not narrowly-tailored, and Justice White has surreptitiously invoked the "least restrictive means" test to make the point.

Why the lack of explicit reference to the test? Although it is quite possible that the absence of explicit articulation was accidental, there is another explanation that is equally plausible. Justice White has more recently attempted to limit the application of the "least restrictive means" test in "time, place and manner" cases. One year after **Grace**, in Regan v. Time, Inc., Justice White wrote: "The less-restrictive-alternative analysis . . . has never been a part of the inquiry into the validity of a time, place and manner regulation. It is enough that the . . . restriction substantially serves the Government's legitimate ends." [101] In 1987 he refined his analysis when he contended that "a time, place and manner restriction is valid if it is narrowly tailored to serve a significant government interest and leaves open ample alternative channels for communication of the information and [we] have not imposed the requirement that the restriction be the least restrictive means available." [102] Justice O'Connor and Chief Justice Rehnquist subscribed to this opinion.

The fifth and final case cited as support for the "least restrictive means" test in **Boos** is Wygant v. Jackson Board of Education. [103] The **Boos** court cites **Wygant** as support for its conclusion that the statute under challenge in **Boos** is "not narrowly tailored" because "a less restrictive alternative is readily available." [104] **Wygant** is a racial-discrimination case, and the reference in **Boos** is to a footnote uniting the "narrowly tailored" language with the "least restrictive means" test--precisely the avenue taken in **Boos**. [105] Except for the language, **Boos** and **Wygant** are dissimilar. However, the case is important because it specifies a test to be applied when invoking the doctrine that regulations be "narrowly tailored": the "least restrictive means" test.

Our analysis of **Boos** is disappointing because it does not lead us to a clear line of cases that have led to the development of the "least restrictive means" test. Thus we are still somewhat in the dark both with regard to the lineage of the test and to its real meaning. One

might expect that the Court's opinion in Widmar v. Vincent would be instructive in comprehending the utility of the "least restrictive means" test. [106] In **Grace**, for example, Justice White cites **Widmar** as support for his claim that absolute prohibitions upon a particular type of expression must be "narrowly drawn to accomplish a compelling governmental interest." [107] The **Widmar** precedent is also cited in **Perry** to limit content-based prohibitions on expression. [108] But an examination of **Widmar** is unrevealing, because the majority opinion by Justice Powell simply refers to the fact that content-based discriminations must be demonstrated to be "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end." [109] The **Widmar** Court cited Carey v. Brown as authority [110], a case also cited in **Perry**. [111]

The issue in **Carey** is equal protection: the majority held that to except labor-dispute picketing from a ban on residential picketing generally is content-discriminatory. The **Carey** opinion cites a half-dozen cases as authority for the conclusion that content-directed legislation "be finely tailored to serve substantial state interests", and that "the justifications offered for any conclusions it draws must be carefully scrutinized." [112] This language is almost verbatim from Police Department of Chicago v. Mosley, [113] the first of five cases cited in support. [114] And **Mosley**, it appears, is the point of origin for the "scrutiny of justifications" language, which is not evident in applications of the "least restrictive means" test after **Carey**.

The **Mosley** Court also dealt with permissible picketing, and in support of its assertion that "discrimination among pickets must be tailored to serve a substantial government interest" Justice Marshall writes as follows: "Cf. Williams v. Rhodes, 393 U.S. 23 . . . (1968)." [115] This is supposed to be a reference to an analogous proposition that is different from, but supportive of, the conclusion in the text. [116] However, Williams v. Rhodes contains no language referring to "tailoring" or "narrowly tailoring," nor is it a "least restrictive means" case. The only connection here is to the "compelling state interest" standard justifying intrusions on First Amendment freedoms; the Court did not go beyond investigating the State's interest because it was unnecessary to do so: the State of Ohio could not demonstrate a compelling interest to keep third parties off the ballot for choosing electors in presidential campaigns. [117] Thus Justice Marshall's opinion in **Mosley** appears to be the final origin of the connection between the "narrowly tailored interests" language and the "least restrictive means" test.

Our lengthy investigation, then, appears to have been futile: we have identified no clear lineage of development of the "least restrictive means" test. Yet this conclusion would lead us to believe that the test originated in 1972, in Justice Marshall's opinion in **Mosley**, when we know that the test has been applied in free-speech cases since the **Near** case in 1931. What happened to the test in the interim? An examination of the remainder of the opinion in Willliams v. Rhodes provides the missing link: in Justice Black's majority opinion, we find a reference to the

"compelling state interest" requirement to "justify limiting First Amendment freedoms" in a direct quotation from NAACP v. Button, a 1963 case that directly invokes the "least restrictive means" test. [118]

**Button** is everything that the intervening cases were not: a careful exposition of alternative means that would have saved an unconstitutional statute, but not at the expense of abridging the rights of those who brought suit against the state. The State of Virginia attempted to prevent the NAACP from representing aggrieved parties in racial-discrimination suits by charging them with "solicitation" of legal business. The Court ruled that litigation is a form of protected political expression, and that the statute in question allowed selective enforcement against unpopular causes such as the NAACP. Hence the statute was overbroad and vague. Brennan's majority opinion clearly and repeatedly invokes the "least restrictive means" test. "Because First Amendment freedoms need breathing space to survive, government may regulate in this area only with narrow specificity." [119] Interpretation of the lower-court decision led the Court to conclude that the statute proscribed any arrangement by means of which prospective litigants were advised to consult particular attorneys. "No narrower reading is possible." [120] Yet the state could have prevented outright misconduct in other ways: " . . . subtler regulations of unprofessional conduct or interference with professional relations, not involving malice, would not touch the activities at bar. . . ." [121] For example, "truly nonpecuniary arrangements involving the solicitation of legal business" could have been exempted in the statute itself, or in its construction by the courts. [122] These are clear examples of alternative, less restrictive means.

**Button** was not the only case in which the "least restrictive means" test was invoked and clearly developed in the early 1960s. A series of cases provided the clear articulation and development of a test the Court has repeatedly relied upon, but seldom employed with clarity and specificity, in political-expression cases during the last twenty years. [123]

The foregoing analysis of the (ab)uses of precedent in Boos v. Barry reveals much about the invocation of the "least restrictive means" test in contemporary times. It would seem that the recent history of the test is little more than the futile incantation of slogans borrowed from earlier cases, with little or no thought given to their meaning or relevance to the instant case. Ironically, the depth of analysis of **Boos** is matched only in cases a quarter-century ago, much as the test languished during the period between the **Near** decision of 1931 and the 1963-1964 cases such as **Button**, and during the period between **Chy Lung** in 1876 and **Near** as well.

This analysis also suggests that the invocation of the "least-restrictive-means" test in contemporary cases involving political expression is dependent upon two factors. If the communication in question is articulated in a nonpublic forum, the test is not applicable. If the forum is quasi-public or clearly public, the test is potentially

employable. In cases of outright abridgment, all of the Justices are willing to apply the standard to insure against the risk of overbroad statutes. On the other hand, when "time, place and manner" regulations are at issue, at least three of the current Justices are willing to abide by a relaxed standard allowing for "ample alternative channels of communication".

Finding the "Least Restrictive Means" for Abridging Commercial Speech

As noted earlier, the Supreme Court has invoked the "least restrictive means" test not only to invalidate regulations that are overbroad but to justify restrictions upon free expression that are narrowly tailored. One recent case employing the test to uphold a limitation on free expression is particularly revealing. In Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, [124] the Supreme Court held 5-4 that Puerto Rico could lawfully prohibit advertising of casinos purposefully directed at Puerto Ricans, despite the First Amendment. Justice Rehnquist, writing for the majority, applied a four-prong test developed in Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York [125] to validate the restriction on commercial speech. First, the commercial speech must concern a lawful activity and not be misleading or fraudulent. Second, the restriction must serve a substantial government interest. Third, the restrictions must "directly advance" that interest. Fourth, the restrictions must be no more restrictive than necessary to serve the government's interest. [126] The **Central Hudson** test has become a familiar figure on the jurisprudential landscape of commercial speech cases. It is the fourth prong of the test that activates the "least restrictive means" analysis and thus merits close scrutiny here.

Justice Rehnquist readily concluded that casino gambling in Puerto Rico is lawful, and asserted that the government's interest in restricting advertising resides in its desire to suppress resident demand for casino gambling. [127] He likewise asserted that the nexus between a ban on advertising and the interest in repressing local demand for casino gambling is sufficiently documented, though his only evidence for this contention is the fact that the legislature targeted only casino gambling for the ban. [128] Accepting **arguendo** that Justice Rehnquist's analysis satisfies the first three requirements of the **Central Hudson** test, an examination of his justification for invoking the "least restrictive means" test is profitable nonetheless.

The majority opinion holds that, given the importance of the asserted government interest in suppressing local demand for casino gambling, the least restrictive means for satisfying this interest is a ban on local advertising for casino gambling. In what way is this abridgment of the First Amendment rights of casino operators less restrictive than other policies? Justice Rehnquist answers this question by comparing a ban on advertising to a ban on casino gambling, which would also satisfy the government's interest. Thus "it is precisely

**because** the government could have enacted a wholesale prohibition of the underlying conduct that it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising." [129] On the other hand, the appellant proposed an alternative that is concededly less restrictive than the advertising ban: a policy of government speech discouraging casino gambling. The majority dismissed this suggestion with the retort that "it is up to the legislature to decide whether or not such a 'counterspeech' policy would be as effective in reducing the demand for casino gambling as a restriction on advertising." [130] This is essentially a revival of Justice Frankfurter's argument against invocation of the "least restrictive means" test. [131]

More importantly for our purposes, the argument in toto is logically defective. Let us call the total ban on casino gambling policy A, the ban on advertising policy B, and the counterspeech approach policy C. Let us assume, as both the majority and dissenters recognize, that A is the most restrictive policy, B is less restrictive than A, and C is less restrictive than B. If the Court **justifies** its decision for B on the ground that B is less restrictive than A, than the Court must decide in favor of C because it is less restrictive than B. The Court cannot defer to another agent the authority to determine whether that agent **wants** policy B or policy C, without conceding that the legislature likewise has the authority to choose between policy A and policy B. To the extent that Justice Rehnquist allows the legislature to do what it wants (i.e., choose A, B or C) regardless of the intrusion upon constitutional rights, he abdicates the function of the courts to test the regulation against the strictures of the constitution. It is doubtful that a majority of the Court is ready to overturn, sub silentio, so prominent a precedent as Marbury v. Madison! [132]

The thesis of Justice Rehnquist's argument is that, in commercial speech cases, so long as a regulation is a less restrictive means, its impact on constitutional rights is not an issue deserving of the Court's attention. This is a most drastic application of the "least restrictive means" test to uphold a statute. The majority opinion's argument is also defective in terms of the lack of precedent for the position taken. **Central Hudson** is no precedent for this position; indeed, Justice Rehnquist did not even cite that opinion for his "deference to the legislature" argument. In fact, **Central Hudson** provides an argument for the opposite conclusion. The majority in **Central Hudson** wrote: "[I]f the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive." [133] Two implications follow: (1) the courts are obligated to consider **any** more limited restriction as a less restrictive means, and (2) the courts are likewise obligated to determine whether or not the less restrictive means serves the interest of the state as well as the more restrictive means. In other words, in **Posadas** the "deference to the legislature" argument is implicitly rejected in the language of the test invoked. No wonder that Justice Rehnquist avoided citing **Central Hudson** as precedent for this novel doctrine.

If we assume that Justice Rehnquist has the authority to subvert a test for constitutionality in the process of applying it, we must still seek the asserted justification for this move. The majority opinion cites two cases (neither of which was decided by the Supreme Court) as authority for the position of deference to the legislature: Capital Broadcasting Co. v. Mitchell [134] and Dunagin v. City of Oxford, Miss. [135] A brief look at the **Dunagin** case alone, however, reveals the inapt nature of both of these precedents.

Initially we should note that the **Dunagin** court **discredits** the continuing vitality of **Capital Broadcasting** as "compelling authority" in commercial-speech cases, for two reasons. First, **Capital Broadcasting** was premised upon the now-destabilized view that commercial speech is completely outside of the purview of the First Amendment. [136] That earlier view was rejected in Virginia Pharmacy Board v. Virginia Citizens Consumer Council [137], and the rejection was reaffirmed in a case that is precisely on point: **Central Hudson.** [138] Second, the Supreme Court "expressly limited **Capital Broadcasting** to the special problems of the electronic broadcast media . . . that make that form of communication especially subject to regulation in the public interest." [139] The **Posadas** ruling was not focused upon broadcast regulation; in fact, the memorandum prohibiting advertising of casinos published by the Tourism Company--the limiting construction of authority touted in Justice Rehnquist's opinion--does not even mention broadcasting as a prohibited form of advertising. [140] Thus Justice Rehnquist cites as support two cases, the second of which refutes the relevance of the first!

Next, we need to identify the reasons why **Dunagin** is itself an inapt precedent for the deference to the legislature proposed in **Posadas.** The issue in **Dunagin** is the right of a state to prohibit advertising of liquor by local, in-state media. The **Dunagin** court emphatically distinguished liquor advertising from the advertising of other products, on the ground that the Twenty-First Amendment to the Constitution uniquely grants to the states the power to regulate the sale of intoxicating liquor. This unparalleled transfer of authority means that the courts "must proceed from a vantage point of presumed state power" and accord "great deference" to state regulations. [141] This effectively reverses the presumption normally accorded federal authority under the Commerce Clause [142], and case law developed in two contemporary Supreme Court decisions [143] commands a standard for constitutional review in cases involving the Twenty-First Amendment that is far less stringent than that articulated in the **Central Hudson** case. [144] Thus the **Dunagin** court concluded that prior decisions "employ a presumption in favor of validity" of the statute, "while ordinarily the burden is on the party defending a restriction on speech, even in a commercial speech case." [145] It is this presumptive burden that Justice Rehnquist shifts in his majority opinion in **Posadas**, thus citing the authority of **Dunagin** to reach precisely the conclusion that **Dunagin** discredits, and extending the principle beyond the realm of liquor control when the authors of the **Dunagin** opinion have specifically warned against such unwarranted applications.

Finally, Justice Rehnquist's abuse of the "least restrictive means" test in **Posadas** is a dramatic reversal of his earlier position on the test. In his eagerness to refashion the **Central Hudson** standard for assessing the constitutionality of commercial speech, Justice Rehnquist fails to mention that he filed a bitter solo dissent against the majority's employment of "least restrictive means" in that case. That dissenting opinion merits reexamination because it reveals as much about the integrity of our current Chief Justice as it does about his mutation of the "least restrictive means" test.

The question in **Central Hudson** was the constitutionality of a regulation issued by the New York Public Service Commission banning electric utilities from advertising to promote the use of electricity. The majority found a total ban "more restrictive than necessary", pointing out that it prevents utilities "from promoting electric uses that would reduce energy use by diverting demand from less efficient services, or that would consume roughly the same amount of energy as do alternative sources." Furthermore, the Court was distressed to observe that "no showing has been made that a more limited restriction on the content of promotional advertising would not serve adequately the State's interests." [146] Justice Powell, writing for the majority, suggested that the Commission might "require that the advertisements include information about the relative efficiency and expense of the offered service, both under current conditions and for the foreseeable future." [147] He even hinted that "a system of previewing advertising campaigns to insure that they will not defeat conservation policy" might be less restrictive because "traditional prior restraint doctrine may not apply to" commercial speech, and because "adequate procedural safeguards" could insure against abuses. [148]

In reply, Justice Rehnquist savaged the Court's "least restrictive means" analysis, predicting that "it will unduly impair a state legislature's ability to adopt legislation reasonably designed to promote" its important interests. [149] How ironic, then, to find Justice Rehnquist arguing exactly the opposite position six years later in **Posadas**: that the test does not intrude upon state authority to review--or not to review--alternative means. [150] The impairment of the legislature, he continued in his dissent in **Central Hudson**, would follow directly from the requirement that alternative means be reviewed. This "leaves room for so many hypothetical 'better' ways that any ingenious lawyer will surely seize on one of them to secure the invalidation" of a regulation under scrutiny. [151] Justice Rehnquist reviewed the analysis of alternatives in the majority opinion, calling it "but one example of the veritable Sargasso Sea of difficult nonlegal issues that we wade into by adopting a rule that requires judges to evaluate highly complex and often controversial questions arising in disputes quite foreign to ours." [152] This may help to explain why Justice Rehnquist wants to protect legislative prerogative in **Posadas**, but he cannot have it both ways: either the "least restrictive means" test requires review of these "difficult nonlegal issues" or it does not. The test cannot require judicial review when invoked to declare regulations unconstitutional, but finesse judicial review when invoked to justify the

constitutionality of state action. Yet this is the way Justice Rehnquist treats the test in **Central Hudson** and **Posadas**, respectively.

What we learn, then, from a cursory review of the application of the "least restrictive means" test in commercial-speech cases is that the test is susceptible to flagrant manipulation by those intent on refashioning it to serve their purposes. If a test constructed to preclude legislative abuse of the right to free expression becomes so convoluted that it can be invoked to justify that very abuse, of what value is the test? Indeed, of what value is the process of designing, articulating and applying tests to controversies? While dramatic examples of abuses such as this may be rare, we dare not forget that the designer of this particular tour de farce has been rewarded with the title of Chief Justice.

## CONCLUSION

The process of identifying a test employed to determine the constitutionality of regulations upon freedom of expression and tracing its development in prior cases can be rewarding as well as frustrating. With regard to the "least restrictive means" test, we find that a search for origins reveals a lack of consistent regard for the test's potential. We discover that the contemporary versions of the test owe as great a debt to ancillary doctrines as to its earliest and clearest and most emphatic articulations. We discover that jurists may use the test to obtain results contrary to expectations and discontinuous with prior usage.

Yet these discoveries are informative indeed. They help to explain why the literature on the history, potential and utility of the test lacks coherence and consistency. They teach us to realize that "tracking" a single test is a formidable and frustrating task, because standards are subject to de-evolution and distortion. They heighten our awareness that the process of developing legal standards is inevitably and indubitably rhetorical. Finally, they sensitize us to the importance of analysis and criticism of tests in use, to help insure that "least restrictive means" and other, similar standards are accurately characterized and properly applied.

We may one day discover that the very survival of our right to freedom of expression depends upon our analytical tenacity and our fidelity to the precise application of critical methods. For the greatest threats to free speech reside not in the risk of some authoritarian takeover of the reins of government, but from the deliberate erosion of our rights via accretions of power. Analysis and criticism of court decisions designed to justify and sanctify the gradual evisceration of our First Amendment rights focuses the spotlight of pitiless publicity upon those who desperately desire to operate under cover of darkness. Let those who would deny freedom of speech step forward and defend their actions.

At the same time, we should realize that standards for assessing the constitutional validity of regulations, such as the "least restrictive means" test, can help to insure that our rights are sustained against warrantless intrusions. Admittedly, they are subject to distortion, as our experience with both the "clear and present danger" test and the "least restrictive means" test documents. Once again vigilance is key. The analysis and criticism of the uses and abuses of the test can pinpoint those occasions where mutations occur and insure against future attempts to misuse the test. Only in this way can we guard against those jurists who employ precedent for their own motives.

FOOTNOTES

[1] "Francis D. Wormuth and Harris G. Mirkin, "The Doctrine of the Reasonable Alternative," **Utah Law Review** 9 (1969): 254-307.

[2] For discussion of the historical deficiencies, see notes 25-35, esp. note 34, **infra**, and accompanying text. Wormuth and Mirkin seem to have been approaching a broader category of decision-making standards than the "least restrictive means" test analyzed herein. They tend to conflate rather than distinguish between the tests for restrictive means and overbreadth (see note 10, **infra**, and accompanying text), which transforms the standard into a device for determining, inter alia, that the least restrictive means to accomplish a legitimate governmental or societal goal may nonetheless be unconstitutional. The following analysis reveals that the "least restrictive means" test, as identified herein, has been employed to validate means that seriously infringe upon First Amendment rights, an outcome that the "doctrine of the reasonable alternative" could not be construed to justify. See note 13, **infra**, and accompanying text.

[3] The conclusion cited above is at 305, and the commentary upon national-security cases is at 306-207.

[4] "Less Drastic Means and the First Amendment," **Yale Law Journal** 78 (1969): 464-474; the author's conclusion is at 474.

[5] "The Constitutionality of Expanding Prepublication Review of Government Employees' Speech," **California Law Review** 72 (1984): 962-1018, esp. 1001-1011; "Freedom of Speech, National Security, and Democracy: The Constitutionality of National Security Decision Directive 84," **Western State University Law Review** 12 (1984): 173-204, esp. 196-203; "National Security Directive 84: An Unjustifiably Broad Approach to Intelligence Protection," **Brooklyn Law Review** 51 (1984): 147-189, esp. 166-173. Note that all of these are student-authored essays.

[6] The only case cited by all three authors was Snepp v. United States 444 U.S. 507 (1980), which is arguably the most important precedent in assessing the constitutionality of NSDD 84. In fact, the attention given to the "least restrictive means" test in these three articles is obviously due to its important role in the **Snepp** opinion. Thus **Snepp** arouses interest in the test, not the other way around. When the authors attempt to explain the origins of the test or the most important instances of its application, they agree upon the concepts (which is easy to do, as will become evident below) but share little understanding of the overall function of the test. None of the authors, for example, attempt to assess the utility of the test in assessing the constitutionality of regulations such as those imposed in the **Snepp** case; they simply assert its relevance by citing its use in prior cases. Yet they disagree on the most important precedents for its use. The following cases were cited more than once, but not by all three authors: Brown v. Glines, 444 U.S. 355 (1980); Southeastern Promotions, Inc. v. Conrad, 420 U.S. 546 (1975); New York Times Co. v. United States, 403 U.S. 713 (1971), Shelton v. Tucker, 364 U.S. 479 (1960).

[7] Melville B. Nimmer, **Nimmer on Freedom of Speech** (New York: Matthew Bender, 1984). Nimmer's only explicit recognition of the language appears in his treatment of the **O'Brien** rule, at 2-89 to 2-93. His equation of that language with the overbreadth doctrine occurs at 2-90, note 20. See para. 2 of the next Section of this essay for identification of the distinctions between "least restrictive means" and overbreadth. Moreover, when Nimmer examines the overbreadth doctrine, he once again includes "least restrictive means" analysis without noticing the distinctions between the two. Ibid., 4-147 to 4-157, esp. 4-150. The conflation of the overbreadth standard and the "least restrictive means" test is erroneous; see note 10, **infra**.

[8] Thomas L. Tedford, **Freedom of Speech in the United States** (New York: Random House, 1985), at 453.

[9] Ibid., at 448, 454.

[10] A prior determination of overbreadth could not preclude consideration of least restrictive means, for a finding that the restriction is the only means to secure an important state interest can justify **upholding** the constitutionality of that restriction, despite the fact that it is otherwise overbroad. See Brown v. Glines, 444 U.S. 348 (1980). Tedford's implication (**supra**, note 9, and accompanying text) that determination of overbreadth **must precede** "least restrictive means" analysis is disproven by the Court's decision-making process in Central Hudson Gas & Electric Co. v. Public Service Comm'n of New York, 447 U.S. 557 (1980), at 566 and 571, note 14.

[11] Jerome A. Barron and C. Thomas Dienes, **Handbook of Free Speech and Free Press** (Boston: Little, Brown, 1979), at 8, 71-72.

[12] Joseph J. Hemmer, Jr., **The Supreme Court and the First Amendment** (New York: Praeger, 1986). Hemmer lists tests in his "Introduction", but the "least restrictive means" test is not mentioned. Franklyn S. Haiman does not include any discussion of the test in **Speech and Law in a Free Society** (Chicago: Univ. of Chicago Press, 1981), but this is understandable since his study does not focus on tests of constitutionality.

[13] E.g., this justification is articulated by the majority in Finzer v. Barry, 798 F.2d 1450 (D.C.Cir. 1986).

[14] "Less Drastic Means," **supra** note 4.

[15] Central Hudson Gas & Electric Corp. v. Public Service Comm'n. of New York, 447 U.S. 557 (1980), at 565, note 8.

[16] Shelton v. Tucker, 364 U.S. 479, at 491 (1960); Tedford, **supra** note 8, e.g., at 453; "Less Drastic Means," **supra** note 4.

[17] Barron and Dienes, **supra** note 11, at 8.

[18] "Prepublication Review," **supra** note 5, at 1001; "National Security Directive 84," **supra** note 5, at 169.

[19] "Freedom of Speech," **supra** note 5, at 196.

[20] Nimmer, **supra** note 7, at 2-89, note 20.

[21] Wormuth and Mirkin, **supra** note 1.

[22] See notes 14-18, **supra**, and accompanying text.

[23] See note 9, **supra**, and accompanying text.

[24] See. e.g., Shelton v. Tucker, 364 U.S. 479, at 485: "There can be no doubt of the right of a State to investigate the competence and fitness of those whom it hires to teach in its schools. . . ." Nevertheless, the Court ruled that the method employed was unacceptable because the end could be "more narrowly achieved" by alternative means. Ibid., at 488. See note 47, **infra**, and accompanying text.

[25] 92 U.S. 275 (1876). Two other possible origins of overbreadth analysis merit mention: the Passenger cases ***, 7 How. 283, and Henderson v. Wickham, 92 U.S. 259 (1876). Because of the diffuse nature of the opinions in the Passenger Cases, later authorities (e.g., Justice Miller in **Henderson**) have suggested that they are not dispositive of the issues raised therein. The **ratio** in **Henderson** is discussed at note 24e, **infra**.

[26] Chp. 1, art. 7, Political Code of Cal., as modified by § 70 of the amendments of 1873-4.

[27] Chy Lung v. Freeman, 92 U.S. 275, at 277-278 (1876).

[28] Ibid., at 280.

[29] In Henderson v. Wickham, 92 U.S. 259 (1876), a tax upon nonresident aliens landing in New York was found to intrude upon the exclusive jurisdiction of Congress to regulate foreign or interstate commerce. Although the Court in Hannibal and St. Joseph R. R. Co. v. Husen, 90 U.S. 465 (1878), characterized this prior decision as grounded in overbreadth analysis, this characterization is inaccurate. The problem in **Henderson** was one of facial invalidity, not overbreadth. Although Justice Miller in his unanimous opinion for the Court in **Henderson** remarked in passing (ibid., at 269) upon the overbreadth problems of the New York statute, the **ratio** focused upon the subservience of state to national jurisdiction (id., at 270-275).

It appears that the Court in **Chy Lung** deliberately invoked overbreadth analysis rather than facial invalidity as the ground for its decision. The California statute in question posed identical jurisdictional problems to those confronted in **Henderson**; yet Justice Miller in **Chy Lung** ignored the conflict with the interstate commerce clause of the Constitution and focused upon the overbreadth of the law. Since these were companion cases, it is hardly likely that Justice Miller inadvertently overlooked the parallels between the contested statutes.

[30] 95 U.S. 465 (1878).

[31] Ibid., at 474.

[32] Id.

[33] Id., at 474-475.

[34] See note 31, **supra**, and accompanying text. Wormuth and Mirkin, **supra** note 1, at 260, identified the Supreme Court's ruling in Powell v. Pennsylvania, 127 U.S. 678 (1888) as "the first deliberate judgment on the problem of alternative means." Although the authors referred to the **Husen** case (ibid., at 257), they devoted only a short paragraph to the subject and did not analyze the opinion. One of the problems with this analysis is discussed in note 36, **infra**.

[35] The evils of overbreadth and the alternative means are cited in note 32, **supra**.

[36] See, e.g., the argument by Justice Frankfurter in Shelton v. Tucker, 364 U.S. 479 (1960), discussed at notes 51-56, **infra**, and accompanying text. Wormuth and Mirkin, **supra** note 1, at 260, report that, in the Court's initial invocation of the test in 1888, Justice Harlan ruled for the court that the determination of less restrictive means is a legislative prerogative. The preceding analysis contests this view of history. The "least restrictive means" test was initially invoked ten years earlier in the **Husen** case; the Court contested the primacy of legislative determination. The most likely explanation for this lack of consistency is that the **Powell** Court was concerned with the constitutionality of a state's police powers absent interference with interstate commerce. The thesis of the decisions in **Chy Lung**, **Husen** and **Powell**, taken together, is this: a state may exercise its police power in an overbroad manner, provided that it does not infringe upon authority delegated to the federal government in the Constitution or upon the rights of individuals. Thus by 1888 at the latest, the doctrine of overbreadth and the "least restrictive means" test were fully developed.

[37] 283 U.S. 697 (1931).

[38] Powell v. Pennsylvania, 127 U.S. 678, at 685 (1888).

[39] Wormuth & Mirkin, **supra** note 1, at 260.

[40] Booth v. Illinois, 184 U.S. 425, at 429 (1902). The Court explicitly employed the "least restrictive means" test to strike down a regulation of commerce as unconstitutional in Weaver v. Palmer Bros., 270 U.S. 402 (1926). The Court characterized Pennsylvania's prohibition against the use of shoddy in quilts and comforters as too drastic because "sterilization eliminates the dangers, if any, from the use of shoddy. As against that fact, the provision in question cannot be sustained as a measure to protect health." Ibid., at 414. In this case the Supreme Court clearly invoked the "least restrictive means" test to assess the State's power to regulate commerce. Wormuth and Mirkin, **supra** note 1, at 265, mistakenly characterize the case as one dealing with economic policy, not the regulation of commerce.

[41] See, e.g., Purity Extract & Tonic Co. v. Lynch, 226 U.S. 192 (1912); Norman v. Baltimore & O.R.R., 294 U.S. 240 (1935).

[42] See, e.g., Hebe Co. v. Shaw, 248 U.S. 297 (1919); Jacob Ruppert Co. v. Caffey, 251 U.S. 264 (1920).

[43] See note 28, **supra**.

[44] 244 U.S. 590 (1917).

[45] 268 U.S. 510 (1925).

[46] Ibid., at 534.

[47] 283 U.S. 697 (1931).

[48] Thomas I. Emerson, **The System of Freedom of Expression** (New York: Random House, 1970), at 504-505.

[49] State v. Guilford, 174 Minn. 457 (1928); State v. Guilford, 179 Minn. 40 (1929).

[50] 283 U.S. 697 at *** (1931).

[51] Ibid.

[52] Id., at 724.

[53] A contemporary treatment of this issue may be found in Buckley v. Valeo, 424 U.S. 1, at 14 (1976).

[54] Ronald A. Cass, "The Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory," **UCLA Law Review** 34 (1987): 1405-1491, at 1453-1455.

[55] 303 U.S. 444 (1938).

[56] Ibid., at 451.

[57] 308 U.S. 147 (1939).

***[58] Ibid, at .

[59] **Freedom of Speech, supra** note 5, at 330.

[60] Cantwell v. Connecticut, 310 U.S. 296 (1940); Martin v. City of Struthers, 319 U.S. 141 (1943); Saia v. New York, 334 U.S. 558 (1948); Kunz v. New York, 340 U.S. 290 (1951).

[61] 364 U.S. 479.

[62] Ibid., at 480.

[63] Id., at 488.

[64] Id. (Footnotes omitted.)

[65] The other Justices concurring with Frankfurter were Tom Clark, John Harlan and Charles Whittaker.

[66] Id., at 493.

[67] Id, at 494.

[68] Id, at 495.

[69] Id, at 495-96. Frankfurter apparently confused academic freedom with academic quality in this argument.

[70] Id, at 496.

[71] 108 S.Ct. 1157 (1988).

[72] Ibid., at 1161.

[73] Id., at 1164 (emphasis in original). Justice Kennedy did not participate in the Court's decision.

[74] The text reads as follows: "Perry Education Assn. v. Perry Local Educators Assn., 460 U.S. [73], at 45. . . [1983]. Accord Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, [Inc.], . . . 107 S.Ct. 2568, 2571 . . . (1987); Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788, 800 . . . (1985); United States v. Grace, 461 U.S. [171], at 177 [1983]." Id. At issue in the following discussion is whether or not the cases cited are in "accord" with the ruling in **Boos**.

[75] Id., at 1165.

[76] Id. The Court cited **Perry** and **Jews for Jesus**, **supra** note 74, in support of this standard.

[77] Id., at 1165-1167.

[78] Id., at 1168. The opinion continues, "Cf. Wygant v. Jackson Bd. of Ed., 476 U.S. 267, 280, n. 6 . . . (1986) (plurality opinion)." Contrary to proper procedure, however, no explanation for the comparison between **Wygant** and the instant case is specified or implied.

[79] Id., at 1164.

[80] See note 74, **supra**.

[81] See note 78, **supra**.

[82] 460 U.S. 37, at 45 (1983).

[83] 447 U.S. 455, at 461 (1980).

[84] United States Postal Service v. Council of Greenburgh Civic Assns., 453 U.S. 114, at 132 (1981); Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530, at 535-36 (1980); Grayned v. City of Rockford, 408 U.S. 104, at 115 (1972); Cantwell v. Connecticut, 310 U.S. 296 (1940); Schneider v. 308 U.S. 147 (1939).

[85] 460 U.S. 37, at 46 (1983), citing Widmar v. Vincent, 454 U.S. 263, at 269-270 (1981). Since Widmar is cited as controlling authority in both "limited" and "quintessential" public forums, but the majority opinion in **Widmar** neither advances nor justifies such a distinction, it would appear that the same test--that regulations both advance a "compelling state interest" and be "narrowly drawn"--applies to restrictions in both of these forums.

[86] Ibid.

[87] See, e.g., Board of Airport Comm'rs of Los Angeles v. Jews for Jesus,Inc., 55 LW 4855, at 4856 (1987).

[88] The dissenting opinion by Justice Brennan, joined by Justices Marshall, Powell and Stevens, invokes "least restrictive means" analysis to illustrate that no policy could achieve the goal of the state without resorting to viewpoint discrimination. 460 U.S. 37, at 66-69.

[89] 55 LE 4855 (1987).

[90] Ibid.

[91] Id., at 4856.

[92] 473 U.S. 788 (1985).

[93] Ibid., at 3448.

[94] Id., at 3457, 3462. Justice Blackmun contended that, in both quintessential and limited public forums, the standards are the same, and include the requirement that the regulation be narrowly tailored. Id., at 3457, citing Clark v. Community for Creative Non-Violence, 468 U.S. 288, at 293 (1984); United States v. Grace, 461 U.S. 171, at 177 (1983); Perry Education Assn. v. Perry Local Educators' Assn., 460 U.S. 37, at 45 (1983); Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, at 647-648 (1981); Carey v. Brown, 447 U.S. 455, at 465 (1980); Police Department of Chicago v. Mosley, 408 U.S. 92, at 96-97 (1972).

[95] 461 U.S. 171 (1983).

[96] Ibid., at 172-173.

[97] Id., at 177, citing Perry Education Assn. v. Perry Local Educators' Assn., 460 U.S. 37, at 45 (1983).

[98] Heffron v. International Society for Krishna Consciousness, 452 U.S. 640, at 647 and 654 (1981); Grayned v. City of Rockford, 408 U.S. 104, at 115 (1972); Cox v. Louisiana, 379 U.S. 559 (1965) (Cox II); Widmat v. Vincent, 454 U.S. 263 (1981).

[99] 461 U.S. 171, at 177 (1983), citing **Widmar**, 454 U.S. 263 (1981), as an example.

[100] 461 U.S. 171, at 182 (1983).

[101] 468 U.S. 641, at 657 (1984). Justice White seems to be ignoring such clear-cut examples as Lovell v. Griffin, 303 U.S. 444 (1938). See notes 55 and 56, **supra**, and accompanying text.

[102] City of Watseka v. Illinois Public Action Council, 107 S.Ct. 919, at 920 (1987) (diss. op.).

[103] 476 U.S. 267 (1986) (plurality op.)

[104] 108 S.Ct. 1157, at 1168 (1988).

[105] 476 U.S. 267, at 280, n. 6 (1986) (plurality op.)

[106] 454 U.S. 263 (1981).

[107] 461 U.S.171, at 177 (1983).

[108] 460 U.S. 37, at 46 (1983).

[109] 454 U.S. 263, at 270 (1981).

[110] 447 U.S. 455 (1980).

[111] 460 U.S. 37, at 45 (1983).

[112] 447 U.S. 455, at 462 (1980).

[113] 408 U.S. 92, at 98-99 ((1972).

[114] 447 U.S. 455, at 462 (1980).

[115] 408 U.S. 92, at 99 (1972).

[116] **A Uniform System of Citation** (12th ed.; Avon, MS: Lorell Press, 1976).

[117] 393 U.S. 23, at 31-34 (1968).

[118] Ibid., at 31, citing 371 U.S. 415, at 438 (1963).

[119] 371 U.S. 415, at 433 (1963). "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." Ibid., at 438.

[120] Id., at 433.

[121] Id., at 440.

[122] Id., n. 19.

[123] See, e.g., Bantam Books v. Sullivan, 372 U.S. 58 (1963); Edwards v. South Carolina, 372 U.S. 229 (1963); NAACP v. Alabama, 377 U.S. 208 (1964).

[124] 108 S.Ct. 2968 (1986).

[125] 447 U.S. 557 (1980).

[126] See 108 S.Ct. 2968, at 2976 (1986). The minority opinion by Justice Brennan likewise endorses the **Central Hudson** test at 2982.

[127] Ibid., at 2977. Justice Brennan takes the majority opinion to task for asserting what must be demonstrated here: that the legislature indeed believed that serious harm would result from casino gambling by residents. Id., at 2983-2984.

[128] Id., at 2978. The dissenting opinion challenges this connection also, at 2984-2985.

[129] Id., at 2979 (emphasis in original). This argument violates a central tenet of the **Central Hudson** test: that only **restrictions upon commercial speech** are to be compared. 447 U.S. 557, at 564 (1980).

[130] Id., at 2978.

[131] See notes 65-78, **supra**, and accompanying text.

[132] I Cranch 137 (1803).

[133] 447 U.S. 557, at 564 (1980).

[134] 333 F.Supp. 582, at 585 (DC 1971).

[135] 718 F.2d 738, 751 (CA5, 1983) (en banc); cert. denied, 467 U.S. 1259 (1984).

[136] Ibid., at 746.

[137] 425 U.S. 748, at 761-762 (1976).

[138] "The First Amendment, as applied to the States through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation." 447 U.S. 557, at 561 (1980).

[139] 718 F.2d 738, at 746 (1983) (citations omitted).

[140] 106 S.Ct. 2968 at 2973 (1986).

[141] 718 F.2d 738, at 744 (1983).

[142] Ibid., at 743.

[143] New York State Liquor Authority v. Bellanca, 452 U.S. 714, at 717 (1981); California v. LaRue, 409 U.S. 109, at 114-115 and 118-119 (1972).

[144] 718 F.2d 738, at 743-745 (1983).

[145] Ibid., at 745.

[146] 447 U.S. 557, at 570 (1980).

[147] Ibid., at 571.

[148] Id., n. 13., citing Virginia Pharmacy Board v. Virginia Citizens Consumer Council, 425 U.S. 748, at 771-772, n. 24 (1976); Freedman v. maryland, 380 U.S. 51 (1965).

[149] Id., at 584-585.

[150] 106 S.Ct. 2968, at 2978 (1986).

[151] 447 U.S. 557, at 600 (1980).

[152] Ibid., at 602, n. 9.